**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

**NONA PAULINE SCHNEIDER**
Claimant
VS.

**PAUL HENSLEIGH**
Respondent
AND

**WAUSAU INSURANCE COMPANY**
Insurance Carrier
AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 170,986

## ORDER

**ON** the 28th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge James R. Ward, dated November 30, 1993, came on before the Appeals Board for oral argument by telephone conference.

## APPEARANCES

Claimant appeared by her attorney, Robert A. Anderson, of Ellinwood, Kansas. Respondent appeared by his attorney, John A. Emerson, of Lawrence, Kansas. The insurance carrier appeared by its attorney, Thomas P. Fay, of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney, Bob W. Storey, of Topeka, Kansas. There were no other appearances.

## RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as stated in his Order of November 30, 1993.

## ISSUES

The claimant appeals the Preliminary Hearing Order and finding of the Administrative Law Judge that the parties were not subject to the Workers Compensation Act for the reasons that respondent did not meet the annual payroll requirement, nor did he file written election with the Director to come under the provisions of the Act.

The issue now before the Appeals Board is whether the language of K.S.A. 44-505(b) pertaining to the filing with the Director of a written statement of election to come within the provisions of the Workers Compensation Act is mandatory when there is other

evidence of clear manifestation of intent to come under the Act by the purchase of workers compensation insurance coverage.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) For preliminary hearing purposes, the Appeals Board adopts those findings and conclusions of Administrative Law Judge James R. Ward as set forth in his Order of November 30, 1993, that are not inconsistent with the findings specifically set forth below.

The undisputed facts are that the respondent, Paul Hensleigh, hired claimant to care for his dying wife. As Mrs. Hensleigh was not expected to live longer than two or three months, Mr. Hensleigh did not expect to pay wages greater than $10,000.00 for the calendar year. Thus, this employment relationship was not subject to coverage under the Workers Compensation Act under the general provisions of K.S.A. 44-505(a), and the parties so stipulated at oral argument before this Appeals Board.

There is conflicting testimony whether claimant and Mr. Hensleigh discussed workers compensation insurance coverage at the time claimant was hired. In any event, claimant either developed or exacerbated symptomatology resembling carpal tunnel syndrome while caring for Mrs. Hensleigh. After claimant's symptomatology had developed, Mr. Hensleigh obtained workers compensation coverage from Wausau Insurance Company. The policy was issued July 28, 1992.

Claimant cared for Mrs. Hensleigh until her death on August 24, 1992. Claimant subsequently filed her claim for workers compensation benefits and alleged a period of accident of May 5 through August 24, 1992.

Mr. Hensleigh did not file a written statement of election to come within the provisions of the Workers Compensation Act as provided by K.S.A. 44-505(b)(2).

(2) The statute we are asked to interpret is K.S.A. 44-505(b), which provides:

> "Each employer who employs employees in employments which are excepted from the provisions of the workmen's compensation act as provided in subsection (a) of this section, shall be entitled to come within the provisions of such act by: (1) Becoming a member in and by maintaining a membership in a qualified group-funded workers' compensation pool, ...; or (2) filing with the director a written statement of election to accept thereunder. Such written statement of election shall be effective from the date of filing until such time as the employer files a written statement withdrawing such election with the director. All written statements of election or withdrawal of election filed pursuant to this subsection shall be in such form as may be required by regulation of the director."

As Mr. Hensleigh did not become a member in a qualified workers compensation pool, the insurance carrier contends it was mandatory under the provisions of the above statute that he file his written statement of election to come under the provisions of the Workers Compensation Act. We do not agree.

In determining legislative intent, we look to K.S.A. 44-501(g), which states:

> "It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees

> within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder."

In construing statutes, the legislative intent is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Hughes v. Inland Container Corp., 247 Kan. 407, 414; 799 P.2d 1011 (1990); and State v. Adee, 241 Kan. 825, 829; 740 P.2d 611 (1987).

Based upon the statutes in question and the expressed legislative intent, the Appeals Board finds for purposes of preliminary hearing that the parties are covered by the Workers Compensation Act and that Mr. Hensleigh's failure to file a written statement of election with the Director to come under the Act is not fatal since he had told claimant that he would obtain workers compensation insurance coverage and had actually purchased a policy from Wausau Insurance Company. The act of acquiring this insurance coverage was a clear manifestation of intent to come under the provisions of the Act.

Our holding brings Kansas in line with other jurisdictions that reject strict conformity with statutory requirements pertaining to affirmative election when there exists other significant evidence of intent to come under the provisions of the Workers Compensation Law. The general statement of law regarding elections appears in Larson, *Workmen's Compensation Law*, Vol. 2A, § 67.13 (1993), which provides:

> "When acceptance of coverage is presumed by statute in the absence of rejection, the rejection must be in strict conformity with statutory requirements, whether by employer or employee. Certainly a court is not going to go out of its way to find a nonelection of the act by an implication or technicality.
>
> But when the question is what will amount to affirmative election of coverage, most courts are less exacting as to formalities, and will accept any realistic evidence of intent to accept coverage, such as actual payment of compensation or the taking out of workmen's compensation insurance."

Further, other jurisdictions have held that an employer may be estopped from denying coverage when the employer has told the employee that he is covered by workmen's compensation. See Larson, supra.

Although the issue before us is one of first impression in our state, the Appeals Board is mindful of the dicta in the decision of Stonecipher v. Winn-Rau Corporation, 218 Kan. 617; 545 P.2d 317 (1976). At page 624 of the decision, the court states:

> "Where there is doubt as to the intent of the employer to be under the act, the fact of workmen's compensation insurance coverage can be persuasive, although it need not be conclusive on the issue whether a particular employee is covered."

Wausau Insurance Company argues that it should be against public policy to obtain insurance coverage on employees who are experiencing symptomatology. The Appeals Board finds that based upon the evidence presented thus far the insurer has not established fraud or any other defense that would void the policy of insurance. Further, the Appeals Board being mindful of the insidious nature of some repetitive use injuries, is unable to state, as a matter of law, that it is against public policy to obtain workers compensation insurance coverage on employees who are experiencing symptomatology. Each case must be decided on its own merits.

## AWARD

**WHEREFORE**, it is the finding, decision and order of this Appeals Board that for preliminary hearing purposes, the Order of Administrative Law Judge James R. Ward, dated November 30, 1993, is reversed; that the parties for preliminary hearing purposes are covered under the provisions of the Workers Compensation Act; and that this proceeding be, and hereby is, remanded to the Administrative Law Judge for additional proceedings herein as the parties may require.

**IT IS SO ORDERED.**

Dated this ____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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